Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SAMUEL H. HOUSTON, PETITIONER

v.

JERRY J. KILPATRICK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of petitioner Samuel H. Houston, warden of the Federal Prison Camp at Elgin Air Force Base, Florida, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 197 F.3d 1134. The opinion of the district court (App., *infra*, 2a-9a) is reported at 36 F. Supp. 2d 1328.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1999. A petition for rehearing was

denied on March 16, 2000 (App., *infra*, 10a-11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3621(e) of Title 18 of the United States Code provides in relevant part:

> **(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—**
>
> * * * * *
>
> **(B) PERIOD OF CUSTODY.**—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

2. Section 550.58(a)(1)(vi)(B) of Title 28 of the Code of Federal Regulations provides in relevant part:

> (a) Additional early release criteria. (1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:
>
> * * * * *
>
> (vi) Inmates whose current offense is a felony:
>
> * * * * *

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) * * * .

STATEMENT

Section 3621(e)(2)(B) of Title 18 provides that the Bureau of Prisons (BOP) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Respondent was denied eligibility for such early release under a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), because his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the Northern District of Florida granted his petition for a writ of habeas corpus and ordered BOP to reconsider respondent for early release without regard to the firearm involved in the offense. App., *infra*, 9a. The court of appeals affirmed. *Id.* at 1a.

1. a. In 1994, Congress created an incentive for federal prisoners to participate in BOP's substance abuse treatment program.[1] Congress authorized BOP to reduce a prisoner's sentence up to one year based on

---

[1] BOP's entire residential substance abuse treatment program consists of three components: (1) a 500-hour unit-based residential phase within the correctional institution; (2) a transitional phase also within the institution; and (3) a community-based transitional services phase, in a community corrections center or on home confinement. See BOP Program Statement 5330.10, CN-01, ch. 5, at 1 (May 17, 1996).

successful completion of such a program. 18 U.S.C. 3621(e)(2). The statute provides, in relevant part:

> **(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—**
>
> * * * * *
>
> (B) **PERIOD OF CUSTODY.**—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e)(2)(B).

b. BOP issued a regulation interpreting Section 3621(e)(2)(B) to exclude from eligibility "inmates [whose] current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 28 C.F.R. 550.58 (1995). Included in Section 924(c)(3)'s definition of "crime of violence" is an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). BOP Program Statement 5162.02 provided that a drug trafficking conviction under 21 U.S.C. 841 or 846 would be considered a "crime of violence" for purposes of early release if the inmate received a two-level enhancement for possession of a dangerous weapon during commission of the offense, under Sentencing Guidelines §§ 2D1.1, 2D1.11. BOP Program Statement 5162.02, CN-01, § 9, at 7 (July 24, 1995, as amended Apr. 23, 1996).

The courts of appeals reached differing conclusions on the validity of that BOP regulation and program statement. See *Pelissero* v. *Thompson*, 170 F.3d 442, 445-446 (4th Cir. 1999) (BOP has discretion to define "nonviolent offense" to exclude crimes where relevant conduct included possession of a firearm, even if that definition does not harmonize with the judicial interpretation of "crime of violence" under Section 924(c)(3)); *Venegas* v. *Henman*, 126 F.3d 760, 761-763 (5th Cir. 1997) (same), cert. denied, 523 U.S. 1108 (1998); contra: *Byrd* v. *Hasty*, 142 F.3d 1395, 1396-1398 (11th Cir. 1998) (BOP's interpretation was inconsistent with the term "nonviolent offense" as used in Section 3621(e)(2)(B) because that term included, by implication, only offenses of conviction that were not "crimes of violence" within the meaning of Section 924(c)(3) and Section 3621(e)(2)(B) "addresses the act of convicting, not sentencing or sentence-enhancement factors"); *Roussos* v. *Menifee*, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP exceeded its authority); *Bush* v. *Pitzer*, 133 F.3d 455, 456-457 (7th Cir. 1997) (same); *Martin* v. *Gerlinski*, 133 F.3d 1076, 1079-1081 (8th Cir. 1998) (same); *Downey* v. *Crabtree*, 100 F.3d 662, 670 (9th Cir. 1996) (same); *Fristoe* v. *Thompson*, 144 F.3d 627, 631 (10th Cir. 1998) (same).

c. Effective October 9, 1997, BOP revised its regulation governing the Section 3621(e)(2)(B) early release program to clarify its criteria for such release. 62 Fed. Reg. 53,690. The accompanying commentary noted the conflicting judicial holdings on the prior regulation and explained that the new rule "avoids this complication by using the discretion allotted to the Director of [BOP] in granting a sentence reduction to exclude inmates whose current offense is a felony * * * that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosive." *Ibid.* As an exercise

of the discretion vested in the Director of BOP, the amended regulation provides that certain categories of inmates "are not eligible for early release," including inmates whose current offense is a felony that involved the carrying, possession, or use of a firearm or dangerous weapon or explosive. 28 C.F.R. 550.58(a)(1)(vi)(B).

BOP Program Statement 5162.04 identifies offenses that, at the discretion of the BOP Director, preclude an inmate from receiving various BOP program benefits, including early release under Section 3621(e). Section 7 of the program statement provides that

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.
>
> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives * * *.

BOP Program Statement 5162.04, § 7, at 9 (Oct. 9, 1997). Subsection 7(b) further specifies that controlled substance offenses, in violation of 21 U.S.C. 841(a) and 846, preclude an inmate from being considered for early release if he received a two-level enhancement under Sentencing Guidelines § 2D1.1 for possession of a firearm. BOP Program Statement 5162.04, § 7(b), at 11-12.

2. On August 22, 1996, respondent was convicted in the United States District Court for the Middle District of Alabama of conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846. He was sentenced to

46 months' imprisonment. Resp. Pet. for Writ of Habeas Corpus at 2. That sentence was based in part on a two-level enhancement of the offense level under Sentencing Guidelines § 2D1.1(b)(1) because the offense involved a firearm. App., *infra*, 6a n.3.

We have been informed that, while serving his term of imprisonment, respondent completed a BOP residential substance abuse treatment program. During his participation in the program, respondent was notified that he would not qualify under BOP's regulation for early release consideration after completion of the program because his current offense was a felony that involved the carrying, possession, or use of a firearm. See App., *infra*, 2a.

3. On July 23, 1998, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, in the United States District Court for the Northern District of Florida, challenging the denial of his early release eligibility. Gov't C.A. Br. 1.

On February 23, 1999, the district court granted relief. App., *infra*, 2a. The district court noted that, in *Byrd* v. *Hasty*, 142 F.3d 1395 (11th Cir. 1998), the court of appeals had ruled that BOP's original regulation and program statement implementing Section 3621(e)(2)(B) exceeded BOP's authority. The *Byrd* court had based its ruling on its view that, because Section 3621(e)(2)(B) speaks in terms of whether a prisoner has been convicted of a nonviolent offense, BOP lacked authority to exclude prisoners from eligibility for early release based solely on sentencing enhancements under Guidelines § 2D1.1(b)(1). App., *infra*, 4a-5a. The district court below found that the *Byrd* decision controlled the instant case as well and invalidated the relevant portions of BOP's new amended regulation implementing Section 3621(e)(2)(B). *Id.* at 3a. The court reasoned

that "[t]he amended regulation changes the language but not the substance of the prior regulation," and that it remained true that BOP "exceeded its statutory authority when it categorically excluded from eligibility those inmates convicted of a non-violent offense who received a sentencing enhancement for possession of a firearm." *Id.* at 6a-7a (quoting *Byrd*, 142 F.3d at 1398).

The district court further noted that, in *Byrd*, the court had ruled that violations of 21 U.S.C. 846 and 841(a)(1) are not crimes of violence and that BOP's interpretation which included some violations of Sections 846 and 841 was in conflict with Section 3621(e)(2)(B). According to the court, BOP's new regulation "would render *Byrd* a trivial criticism of the Bureau's drafting technique rather than a substantive ruling on the meaning of the statute and the scope of the Bureau's authority thereunder. If *Byrd* is to be relegated to such a meaningless role, it will have to be the Eleventh Circuit that does the relegating." *Id.* at 8a. The court noted that it could be debated whether a prisoner in respondent's situation should be denied a sentence reduction, whether Congress delegated that decision to BOP, and whether the court of appeals should overrule or revisit *Byrd*. The court concluded, however, that whether a district court was required to give effect to *Byrd*'s reasoning and substantive holding was "not reasonably subject to debate." *Id.* at 8a-9a. The court therefore granted respondent's petition for a writ of habeas corpus, and directed BOP to release respondent from custody unless, within 30 days, BOP had considered his request for early release without regard for the firearm involved in the offense of conviction. *Id.* at 9a.

4. The court of appeals affirmed, for the reasons stated in the district court's opinion. App., *infra*, 1a.[2]

REASONS FOR GRANTING THE PETITION

This case presents the question whether BOP may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B). On April 24, 2000, the Court granted the petition for a writ of certiorari in *Lopez* v. *Davis*, No. 99-7504, to review a decision of the Eighth Circuit raising the same issue.

As we explained in our brief in response to the petition in *Lopez*, Section 3621(e)(2)(B) provides BOP with discretion to grant early release to nonviolent offenders who successfully complete a substance abuse treatment program. It states that the term of imprisonment of a prisoner convicted of a nonviolent offense "may be reduced" by BOP upon the prisoner's successful completion of a BOP substance abuse treatment program. 18 U.S.C. 3621(e)(2)(B). "The word 'may,' when used in

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[2] On March 31, 1999, respondent filed a motion requesting the district court to order BOP to release him from the halfway house where he was then living and place him on supervised release. On April 29, 1999, the district court ordered respondent released from the halfway house on or before May 13, 1999. The court of appeals declined to stay that order. Respondent was released from the halfway house on May 13, 1999, approximately six and one-half months before his likely good conduct time release date in late November 1999. See Gov't C.A. Br. 2-3. If this Court determines that the district court's order granting a writ of habeas corpus was in error, the district court could order respondent to serve the remainder of his sentence.

a statute, usually implies some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). Nothing in the statute contradicts that interpretation. In light of the statute's grant of discretion to BOP in deciding which nonviolent offenders should receive early release, the question is whether BOP's implementation of the statute is a permissible one. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); see also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995). As the Eighth Circuit correctly ruled, BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as prisoners who would not be granted early release under 18 U.S.C. 3621(e)(2)(B), categories of prisoners convicted of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." *Bellis* v. *Davis*, 186 F.3d 1092, 1095 (1999), cert. granted *sub nom. Lopez* v. *Davis*, No. 99-7504; accord *Bowen* v. *Hood*, 202 F.3d 1211 (9th Cir. 2000).

When the Court reviews that ruling by the Eighth Circuit in *Lopez*, it will consider the validity of BOP's current early release regulation and program statement which were applied in the instant case. The Court's resolution of that question will likely determine whether BOP engaged in a lawful exercise of discretion in this case as well. Accordingly, this petition should be held pending the Court's decision in *Lopez*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Lopez* v. *Davis*, No. 99-7504, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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JUNE 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 99-10862

JERRY J. KILPATRICK, PETITIONER-APPELLEE

v.

SAMUEL H. HOUSTON, RESPONDENT-APPELLANT

Appeal from the United States District Court for the Northern District of Florida (No. 98-00282-3-CV-RH); Robert Hinkle, Judge

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[Filed: Dec. 10, 1999]

Before: BLACK, Circuit Judge, and GODBOLD and FAY, Senior Circuit Judges.

PER CURIAM:

The judgment of the district court is affirmed for the reasons stated in its Order Granting Writ of Habeas Corpus, which is published at 36 F.Supp. 2d 1328 (N.D. Fla. 1999).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

No. 3:98CV282-RH

JERRY J. KILPATRICK, PETITIONER

v.

SAMUEL H. HOUSTON, RESPONDENT

[Filed: Feb. 23, 1999]

ORDER GRANTING WRIT OF HABEAS CORPUS

HINKLE, District Judge.

Petitioner Jerry J. Kilpatrick, who is in federal custody on his conviction of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846, challenges the refusal of the Bureau of Prisons to reduce his sentence based on his successful completion of an in-custody substance abuse treatment program. The Bureau denied Mr. Kilpatrick's request for a sentence reduction because a codefendant possessed a firearm in connection with the conspiracy offense, thus making Mr. Kilpatrick ineligible for a sentence reduction under the applicable Bureau regulation. Based on

the controlling decision in *Byrd* v. *Hasty*, 142 F.3d 1395 (11th Cir. 1998), I hold the relevant portion of the regulation invalid and direct the Bureau to consider Mr. Kilpatrick's request for a sentence reduction in accordance with this ruling.

In 1994, Congress directed the Bureau to make appropriate substance abuse treatment programs available "for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b). As an "[i]ncentive for prisoners' successful completion of treatment program," 18 U.S.C. § 3621(e)(2) (heading), Congress provided:

> The period a prisoner *convicted of a nonviolent offense* remains in custody after successfully completing a treatment program *may be reduced* by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B) (emphasis added). As the statute on its face made clear, the Bureau could reduce a sentence only if a prisoner was "convicted of a nonviolent offense." Further, by providing that sentences of such prisoners "may be reduced," not "shall be reduced," and by imprecisely delineating the period of reduction as "not . . . more than one year," the statute clearly delegated at least some discretion to the Bureau with respect to its implementation of the statute.

In 1995, the Bureau attempted to implement the statutory provision for sentence reductions by adopting a regulation excluding from eligibility any prisoner whose offense was a "crime of violence." See 28 C.F.R.

§ 550.58 (1995).[3] In a program statement, the Bureau further restricted eligibility by defining "crime of violence" to include any crime for which the sentence was enhanced under United States Sentencing Guidelines § 2D1.1(b)(1). This rendered a prisoner ineligible for a sentence reduction if "a dangerous weapon (including a firearm) was possessed" in connection with the offense of conviction. See U.S.S.G. § 2D1.1(b)(1).[4]

In *Byrd* v. *Hasty*, 142 F.3d 1395 (11th Cir. 1998), the Eleventh Circuit, like most courts that had considered the issue, squarely held that the Bureau exceeded its authority by excluding prisoners from eligibility based solely on § 2D1.1(b)(1) sentencing enhancements. The court based its ruling on its view of the statute's plain meaning and the Bureau's lack of authority to depart therefrom. The court ruled that Byrd, who like Mr.

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[3] The Bureau defined "crime of violence" by reference to 18 U.S.C. § 924(c)(3), which makes it a separate offense to use or carry a firearm "during and in relation to" any "crime of violence." The term "crime of violence" as defined in § 924(c)(3) does not include every drug trafficking offense. This is clear not only from the definition of a "crime of violence" in § 924(c)(3) but also because § 924(c) makes it an offense to use or carry a firearm not only during and in relation to a "crime of violence" but also during and in relation to any "drug trafficking offense." Any interpretation of "crime of violence" that automatically included every "drug trafficking offense" would render totally superfluous Congress's reference in § 924(c) to any "drug trafficking offense."

[4] Under § 2D1.1(b)(1), sentence enhancement for possession of a firearm is appropriate when a weapon is foreseeably possessed by a co-conspirator, even without the defendant's knowledge. See, *e.g.*, *United States* v. *Otero*, 890 F.2d 366, 367 (11th Cir. 1989). Accordingly, the effect of the Bureau's interpretation was to render ineligible for sentence reduction prisoners who, like Mr. Kilpatrick, did not possess a firearm, but whose co-conspirators foreseeably did.

Kilpatrick in the case at bar was convicted of a drug trafficking offense and whose sentence was enhanced under § 2D1.1(b)(1) based on possession of a firearm, was not ineligible for a sentence reduction by reason of that enhancement. The court said:

> [W]e adopt the reasoning of those courts that have found that the BOP exceeded its authority. The statute, 18 U.S.C. § 3621(e)(2)(B), speaks only in terms of conviction. Byrd was convicted of conspiracy and possession with intent to distribute cocaine (violations of 21 U.S.C. §§ 846 and 841(a)(1)), *which are not crimes of violence.* Although Byrd received a sentencing enhancement under § 2D1.1(b)(1) of the Sentencing Guidelines, "[s]ection 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors." *Downey* [v. *Crabtree*, 100 F.3d 662,] 668 [(9th Cir. 1996)]. As a result, we conclude that the BOP *exceeded its statutory authority* when it categorically excluded from eligibility those inmates convicted of a non-violent offense who received a sentencing enhancement for possession of a firearm. *The BOP's interpretation of the 18 U.S.C. § 3621(e)(2)(B) is simply in conflict with the statute's plain meaning.*

Byrd v. *Hasty*, 142 F.3d 1395, 1398 (11th Cir. 1998) (emphasis added).

The Bureau now has amended the regulation that was at issue in *Byrd* (and the cases on which *Byrd* relied). The amended regulation changes the language but not the substance of the prior regulation; the Bureau has changed its substantive position not a whit. The new regulation excludes from eligibility for a sentence reduction any prisoner whose offense "involved

the carrying, possession, or use of a firearm." 28 C.F.R. § 550.58(a)(1)(vi)(B) (1998). Under this language, as under the prior regulation and program statement at issue in *Byrd*, any prisoner whose sentence was enhanced under § 2D1.1(b)(1) is automatically ineligible for a sentence reduction; the standard set forth in the new regulation is substantively identical to the standard set forth in § 2D1.1(b)(1). Indeed, the sole basis on which the Bureau has denied Mr. Kilpatrick's request for a sentence reduction is that his sentence was enhanced under § 2D1.1(b)(1), thus establishing that his offense "involved the carrying, possession, or use of a firearm" within the meaning of the Bureau's regulation.[5]

It is true, as the Bureau notes, that the new regulation no longer uses the phrase "crime of violence." But the statute the Bureau is charged with implementing still allows reduction of the sentence of a "prisoner convicted of a nonviolent offense." 18 U.S.C. § 3621(e)(2)(B). The plain meaning of this statute is still the same as it was when *Byrd* was decided. The Bureau's authority under that statute is still the same as it was when *Byrd* was decided.

The Eleventh Circuit squarely held in *Byrd* that the Bureau "exceeded its statutory authority when it

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[5] The perfect match between the Bureau's new regulation and § 2D1.1(b)(1) is underscored by the facts of the case at bar. Mr. Kilpatrick did not himself carry, possess or use a firearm. A co-conspirator *did* possess a firearm, however, making enhancement of Mr. Kilpatrick's sentence proper under § 2D1.1(b)(1). See, *e.g.*, *Otero*, 890 F.2d at 367. The Bureau has automatically applied its new regulation to Mr. Kilpatrick, confirming that the regulation has the same meaning as § 2D1.1(b)(1).

categorically excluded from eligibility those inmates convicted of a non-violent offense who received a sentencing enhancement for possession of a firearm." *Byrd*, 142 F.3d at 1398. If that was true then, it is true now. Although the language is different, the new regulation, like the old regulation and program statement, "categorically excluded from eligibility those inmates who received a sentencing enhancement for possession of a firearm," that is, those inmates whose offenses involved possession of a firearm. That the Bureau has now adopted the underlying substance of Sentencing Guidelines § 2D1.1(b)(1), rather than explicitly referring to that provision or to sentencing, is a distinction without a difference.

Further, in *Byrd* the Eleventh Circuit unequivocally ruled, as a basis of its holding, that 21 U.S.C. §§ 846 and 841(a)(1) "are not crimes of violence." *Byrd*, 142 F.3d at 1398. That was the court's interpretation of the statute (which makes eligible a prisoner convicted of a "nonviolent offense"), not simply the court's interpretation of the Bureau's regulation and program statement. That this is so is confirmed by the program statement itself, which clearly defined "crime of violence" as used by the Bureau to include any offense involving possession of a firearm (that is, any offense resulting in a sentence enhancement under § 2D1.1(b)(1)). Thus "crime of violence" under the Bureau's interpretation did include some violations of §§ 846 and 841; when the court unequivocally said violations of those sections "are not crimes of violence," it was talking about the statute, not the Bureau's different interpretation. The court therefore struck down the Bureau's interpretation, saying, "The BOP's interpretation of the 18 U.S.C.

§ 3621(e)(2)(B) is simply in conflict with the statute's plain meaning." *Byrd*, 142 F.3d at 1398.

The Bureau's contrary position would render *Byrd* a trivial criticism of the Bureau's drafting technique rather than a substantive ruling on the meaning of the statute and the scope of the Bureau's authority thereunder. If *Byrd* is to be relegated to such a meaningless role, it will have to be the Eleventh Circuit that does the relegating.

Whether a sentence reduction should be denied a person convicted of a drug trafficking offense who possessed a firearm (or whose co-conspirator foreseeably possessed a firearm) could be debated.[6] Whether that is a decision Congress made in the statute or delegated to the Bureau (that is, whether *Byrd* was correctly decided) could be debated. Whether the Eleventh Circuit en banc should reach a different result, or perhaps even whether a new panel of the Eleventh Circuit should use the Bureau's new language as an opportunity to revisit *Byrd*, could be debated. But whether a district court in this circuit should give full meaning to *Byrd's* own explicit reasoning and substantive holding is not reason-

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[6] On this it perhaps bears noting that a person who possessed (or whose co-conspirator foreseeably possessed) a firearm already will have had his or her sentence increased based on the firearm possession. A person whose co-conspirator foreseeably possessed a firearm will have had his or her sentence enhanced even if he or she did not know about the firearm. See *Otero*, 890 F.2d at 367. The reason for denying such a person the same incentive to obtain substance abuse treatment as other persons convicted of nonviolent offenses is less than clear.

ably subject to debate. The clear import of Byrd requires the same result in the case at bar.[7]

The only remaining issue is the relief that should follow. In *Byrd*, the Eleventh Circuit remanded the case to the district court "with instructions to refer the case to the Bureau of Prisons for consideration in accordance with this opinion." *Byrd*, 142 F.3d at 1398. The Bureau's continuing failure to comply with the import of *Byrd* has not yet risen to the point that a less deferential remedy should be implemented. A reasonable time limit, however, should be adopted.[8] Accordingly,

IT IS ORDERED:

The clerk shall enter judgment providing, "The petition for writ of habeas corpus is GRANTED. Respondent shall release the petitioner from custody unless, within 30 days, the Bureau has considered petitioner's request for a sentence reduction for successful completion of the Bureau's substance abuse program without regard to petitioner's co-conspirator's possession of a firearm during the offense of which petitioner was convicted." The court reserves jurisdiction to enforce this order.

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[7] It is true, as the Bureau notes, that in *Byrd* the Eleventh Circuit explicitly declined to address the validity of the Bureau's new regulation, which had been adopted before the *Byrd* decision was issued. See *Byrd*, 142 F.3d at 1398. The issue was not before the court, and the court thus properly declined to address it. That does not mean, however, that this court should now ignore the logical import of the *Byrd* court's decision.

[8] Mr. Kilpatrick asserts that if he had been afforded a sentence reduction, he would already have been released. The Bureau has not disputed this. Time is therefore of the essence.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10862

JERRY J. KILPATRICK, PETITIONER-APPELLEE

versus

SAMUEL H. HOUSTON, RESPONDENT-APPELLANT

On Appeal from the United States District Court for the Northern District of Florida

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[Filed: Mar. 16, 2000]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____ F.2d ____).

Before: BLACK, Circuit Judge, GODBOLD and FAY, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5),

the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ SUSAN H. BLACK
SUSAN H. BLACK
UNITED STATES CIRCUIT JUDGE

Opposition Brief Unavailable for Filming

(3)

SEP 20 2000

No. 99-2008

In the Supreme Court of the United States

SAMUEL H. HOUSTON, PETITIONER

v.

JERRY J. KILPATRICK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 99-2008

SAMUEL H. HOUSTON, PETITIONER

v.

JERRY J. KILPATRICK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent opposes the government's request that the government's petition for a writ of certiorari be held pending this Court's disposition of *Lopez* v. *Davis*, cert. granted, No. 99-7504 (Apr. 24, 2000), and disposed of as appropriate in light of the resolution of that case. The petition should be held, however, because the court of appeals' decision in this case rests on the same legal grounds that the Court will consider in *Lopez*: the validity of the current regulation of the Bureau of Prisons (BOP), 28 C.F.R. 550.58(a)(1)(vi)(B), and BOP's program statements on early release of prisoners from custody under 18 U.S.C. 3621(e)(2)(B). The Court's resolution of that question will likely determine

whether BOP engaged in a lawful exercise of discretion in this case as well.

1. Respondent contends (Br. in Opp. i, 1, 3) that the case is moot because he has been released from BOP custody and is now on supervised release. Respondent is mistaken.

The court of appeals affirmed a district court order granting a writ of habeas corpus that ultimately required respondent's release from BOP's custody approximately six and one-half months before the date on which BOP would otherwise have released him, assuming respondent was entitled to full good conduct credits. Pet. 9 n.2. If the government prevails in *Lopez*, this Court's decision will remove the basis of the lower court's rulings here and expose respondent to the possibility of being returned to the custody of the BOP for service of the approximate six and one-half months that he would otherwise have served if the erroneous lower court rulings had not issued. Accordingly, the case is not moot.

The fact that the BOP may have to seek an order from the court on remand to retake respondent into custody does not render the case moot as respondent suggests (Br. in Opp. 3). And such a request by BOP would not be based on an allegation of a violation of supervised release as respondent claims (*id.* at 4). Rather, BOP would be seeking reinstatement of the original term of imprisonment against respondent. As respondent concedes (*ibid.*), BOP may take back into custody a released inmate when the inmate's sentence is reinstated following a successful government appeal. See *United States* v. *Meyers*, 200 F.3d 715, 721-722 n.3 (10th Cir. 2000) (defendant's completion of sentence does not moot government appeal claiming length of sentence is too short because government still alleges a

remediable injury); cf. *Mabry* v. *Johnson*, 467 U.S. 504, 507 n.3 (1984). Here, a decision in BOP's favor in *Lopez* would entitle BOP to reinstatement of respondent's original sentence, because such a decision would mean that the sentence was unlawfully shortened by the district court's grant of habeas corpus relief.

Respondent implies that BOP is estopped from opposing his mootness argument because, in a motion seeking a stay in a district court in a different case (*Williams* v. *Hood*), the government opposed early release of a prisoner asserting, without elaboration, that his release would render the action moot. Br. in Opp. 3-4 (citing Br. in Opp. App. 4).[1] But the government is

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[1] The district court's order granting the stay motion in that prisoner's case did not elaborate on the rationale underlying the order. See Civil Mins. Doc. No. 18, *Williams* v. *Hood*, No. 99-12HA (D. Or. Mar. 31, 2000). At the hearing on the stay motion, however, the government contended that the stay should be granted to avoid disparity in treatment among prisoners and the court indicated that it was granting the stay to ensure consistency with other pending cases raising the same legal issue in which the court had vacated the judgments in light of the Ninth Circuit's decision in *Bowen* v. *Hood*, 202 F.3d 1211 (2000), petitions for cert. pending, Nos. 99-10159, 99-10221. See Tr. at 8, 16, 19, 23, *Harbaugh* v. *Hood*, No. 99-773-HA (D. Or. Mar. 31, 2000). The *Bowen* decision had recently been issued and stood as circuit precedent, but the mandate had not yet issued.

When that prisoner applied to this Court for an order vacating the stay entered by the district court, the Solicitor General filed a memorandum on behalf of the respondent warden in opposition to his application and similar applications from three other prisoners. Mem. for Resp. in Opp. at 13-14, Nos. 99A852, 99A853, 99A854, 99A855. We contended that vacatur of the stays was not appropriate because there was not a fair prospect that a majority of the Court would reverse the court of appeals' ruling in *Bowen*. *Id.* at 17-19. We also argued that the balancing of equities favored leaving the district court stays in place. *Id.* at 19-24. In that context,

not estopped from opposing respondent's mootness argument. The doctrine of judicial estoppel, which protects against a party's assertion of a position in one legal proceeding that contradicts its position in another, see *United States* v. *Levasseur*, 846 F.2d 786, 792 (1st Cir.), cert. denied, 488 U.S. 894 (1988), is inapplicable here. Even assuming that it could apply against the United States, see *id.* at 793 n.7 (reserving whether it could apply against the government in a criminal case), and extends to issues of law as opposed to fact, see *Pittston Co.* v. *United States*, 199 F.3d 694, 701 n.4 (4th Cir. 1999), there is no showing in this case (see note 1, *supra*) that a court relied on the government's statements. See *Teledyne Indus.* v. *NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990) ("[B]efore the doctrine of judicial estoppel may be invoked, the prior argument must have been accepted by the court."). There is therefore no basis for applying judicial estoppel to bar the United States from asserting before this Court its position on the law of mootness. And even assuming there could ever be a traditional estoppel against the government, see *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 423 (1990) (reserving that issue), respondent makes no effort to show detrimental reliance on the government's filing in the other case, which is a

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we noted that, if the stays were vacated, "the cases may well become moot, as a practical matter, as to respondent and the BOP, which will be effectively precluded from applying to applicants the Ninth Circuit's resolution of the underlying legal issue." *Id.* at 23. Our reference to the cases becoming "moot, as a practical matter," and to the BOP being "effectively precluded" from applying circuit precedent to the cases referred to the practical realities that would face BOP if the prisoners' release was not stayed pending further litigation of the issue. See p. 5, *infra*.

required element of estoppel. *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 60-61 (1984).

Of course, after a prisoner is released from imprisonment and placed on supervised release, it may well become impractical for BOP later to require him to return to its custody to serve a short period of imprisonment that was erroneously invalidated by a lower court, because the former prisoner may already have successfully completed his transition back to society. If, however, the prisoner has not successfully reintegrated himself into society and a return to BOP custody to complete the term of imprisonment would be appropriate (*e.g.*, return to a halfway house program to facilitate such reintegration), BOP may need to arrange for his retaking and completion of his imprisonment term. The case does not become moot as a legal matter because BOP has the authority in such a case to obtain a court order authorizing the retaking of the prisoner for service of the remainder of his sentence.

2. Respondent also contends (Br. in Opp. 1, 2-3 n.2) that the Court should deny review because, even if this Court were to rule in the government's favor in *Lopez*, the court of appeals could not reverse the district court judgment without addressing two other grounds that respondent claims would support affirmance of the district court judgment—whether BOP's regulations are invalid for failure to comply with the Administrative Procedure Act, and whether BOP incorrectly applied its regulation on carrying or possession of a firearm to respondent because it was his co-conspirator who had actual possession of the firearm.

Although the court of appeals may have to consider alternate grounds of decision if the Court were to rule in the government's favor in *Lopez* and remand this case for further consideration, that is not a reason for

the Court to decline to hold the government's petition pending its decision in *Lopez*. To the contrary, consideration by the lower courts of such alternative grounds is one of the reasons that the Court issues an order granting certiorari, vacating the judgment below, and remanding the case to the lower court for reconsideration in light of an intervening Supreme Court ruling, rather than simply issuing a summary reversal order. See Robert L. Stern et al., *Supreme Court Practice* 249-250 (7th ed. 1993). And that is precisely a situation in which it is appropriate for the certiorari papers in one case to be held by the Court pending its plenary ruling in another case. *Ibid.*[2]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's disposition of *Lopez* v. *Davis*, No. 99-7504, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000

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[2] Respondent's assertion (Br. in Opp. 1, 2) that granting certiorari in this case would constitute a waste of judicial resources disregards the fact that the government has requested that the petition not be granted immediately but, instead, be held pending the Court's decision in *Lopez* to conserve judicial resources and to allow disposition of the petition in light of the Court's decision in *Lopez*.